In The

Supreme Court of the United States

October Term, 1975

No. 75-1612

ETHYL CORPORATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, Ethyl Corporation (a Virginia corporation), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 19, 1976.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are contained in the Joint Appendix being separately filed with the Court on behalf of all of the petitioners

in the proceeding below.* The opinions have not yet been published in the official reports, but they have been published at 8 ERC 1785.

JURISDICTION

In Opinions issued January 28, 1975 (7 ERC 1353), a panel of the Court of Appeals for the District of Columbia Circuit ruled by a vote of two to one that the Respondent's regulations, the subject of review in this proceeding, should be set aside. On March 17, 1975, the Court of Appeals granted Respondent's petition for a rehearing *en banc* and vacated the panel opinions. The final judgment of the Court of Appeals, affirming Respondent's regulations by a five to four vote, was entered on March 19, 1976. Upon joint motion of all of the petitioners in this proceeding and the Respondent, the Court of Appeals entered an order on April 7, 1976, staying its mandate through May 6, 1976, pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This case involves a challenge by Petitioner and others to the validity of regulations issued by Respondent under Section 211(c)(1)(A) of the Clean Air Act requiring the phased reduction of lead additives ("lead antiknocks") in

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* The Joint Appendix contains the final opinions of the Court of Appeals in the cases of Ethyl Corp. v. EPA (No. 73-2205), PPG Industries, Inc. v. EPA (No. 73-2268), E. I. DuPont de Nemours & Co. v. EPA (No. 73-2269), Nalco Chemical Co. v. EPA (No. 73-2270), and National Petroleum Refiners Ass'n v. EPA (No. 74-1021). The Petitioner understands that separate petitions for a writ of certiorari are being filed by PPG Industries, DuPont, Nalco and the National Petroleum Refiners Association.

motor gasoline. The case raises difficult and complex issues of national significance that were decided by a closely divided Court of Appeals whose lengthy and sharply conflicting opinions demonstrate the need for review and final decision by this Court. Specifically, the questions presented are:

1. Whether the Administrator of the Environmental Protection Agency has been empowered by Section 211 of the Clean Air Act to assess hypothetical and speculative risks and make "essentially legislative policy judgments," as the majority of the Court of Appeals held, even where the available medical and scientific evidence (which is voluminous) is admittedly inconclusive and fails to establish that the emission products of lead antiknocks in gasoline cause any harm to the public health.

2. Whether, in reviewing agency rule-making in the area of environmental control, the courts should be limited to a finding of minimal rationality on the part of the agency, as held by the majority below, without inquiry into the propriety of the methodology employed by the agency in assessing the evidence or the reasonableness of the procedures it followed in formulating its regulatory program.

3. Whether, notwithstanding the requirements of due process and the Administrative Procedure Act, the Administrator may issue regulations based in large part upon preliminary, untested studies and new data as to which interested parties have not been given notice or the opportunity for meaningful comment.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Air Act (42 U.S.C. §§ 1857c-3, 1857c-4, 1857f-1, 1857f-6c(c)), the Adminis-

trative Procedure Act (5 U.S.C. § 553), and the regulations involved (40 C.F.R. §§ 80.1, 80.2(c), 80.20, 80.25, 80.26) are set forth in Appendix A to this petition.

STATEMENT OF THE CASE

Background of Lead Antiknocks

The regulations under review[1] were promulgated by the Respondent, the Environmental Protection Agency, under Section 211(c)(1)(A) of the Clean Air Act, 42 U.S.C. § 1857f-6c(c). The Regulations require the phased reduction over five years by 60-65% of lead antiknocks used in all motor gasoline sold in the United States. 40 C.F.R. §§ 80.1, .2, .20, .25, .26, 38 Fed. Reg. 33734-33741 (1973) (A. at 1-9).

Lead antiknocks have been added to motor gasoline since 1923 to increase the octane rating of gasoline for use in high compression engines that operate with greater efficiency. A large industry, providing thousands of jobs and owned by thousands of private investors, has grown up to supply lead antiknocks to gasoline refiners.

Lead antiknocks serve as "energy extenders," enabling the refiner to produce more gasoline of a higher octane from a given amount of crude oil at a lower cost. The saving of crude oil from the use of lead antiknocks is 5-6%. The use of lead antiknocks over the years has resulted in the saving of billions of barrels of essential crude oil and billions of dollars by the motoring public in the United States. Today, in the face of continuing energy problems, the substantial elimination of lead antiknocks will greatly increase the use of crude oil and the cost of gasoline (placing substantial reliance upon imported supplies and further draining our bal-

[1] Judicial review is expressly authorized under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1).

ance of payments), require the substitution of aromatic compounds which result in the emission of carcinogens and compel the expenditure of billions of dollars by the refining industry to make the changes in equipment necessary to manufacture commercial gasoline without lead antiknocks.

The effects on the public health of the use of lead antiknocks in gasoline have been the subject of continued study and monitoring for more than fifty years, much of it planned, sponsored, financed and supervised by governmental agencies. From all this study, not one person has been found to have any identifiable adverse health effects from lead emitted from motor vehicle exhausts. Neither the Respondent nor the majority of the Court of Appeals have shown otherwise.

Background of Regulations

The Respondent issued the regulations in question under Section 211(c)(1)[2] of the Clean Air Act Amendments of 1970, which in precise terms authorizes the EPA Administrator to:

> "control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) *if any emission products of such fuel or fuel additive will endanger the public health or welfare* . . . ." (Emphasis added.)[3]

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[2] 42 U.S.C. § 1857f-6c(c)(1).

[3] Section 211 also authorizes the regulation of fuel additives upon a finding that the additive significantly impairs the performance of an emission control device in general use. Regulations based on that ground requiring the general availability of at least one grade of unleaded gasoline were issued in early 1973, 40 C.F.R. §§ 80.1-.24, and were upheld by the D. C. Circuit in *Amoco Oil Co.* v. *EPA*, 501 F.2d 722 (D.C. Cir. 1974). Those regulations are not in issue in this proceeding.

Within a month after Section 211 was enacted by Congress, the Respondent publicly announced that it was reviewing the medical and scientific data applicable to the health effects of lead, and that regulations to reduce the lead content of motor fuel were "anticipated."[4] Proposed regulations were first published on February 23, 1972,[5] accompanied by a document purporting to summarize the medical and scientific basis for the proposal.[6] EPA invited comments on the proposal and conducted public hearings on the subject during the Spring of 1972 in Washington, Dallas, and Los Angeles.

Thereafter, on January 10, 1973, EPA issued a new set of proposed regulations[7] as well as a completely revised health document.[8] The Respondent again invited public comment, citing the fact that the agency's basis for the regulations "has been substantially revised." 38 Fed. Reg. 1254 (1973).

On October 28, 1973, a panel of the Court of Appeals below (Judges Wright and McGowan), in an unreported order entered in response to a motion filed in *Natural Resources Defense Council* v. *EPA*, D.C. Cir. No. 72-2233, directed the Respondent to reach a final decision on whether to regulate the lead content of fuel for health reasons *within thirty days*. The final regulations were promulgated on November 28, 1973, accompanied by a third —and again substantially revised—review of the available

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[4] 36 Fed. Reg. 1486 (Jan. 30, 1971) (A. at 26).

[5] 37 Fed. Reg. 3882 (1972) (A. at 22).

[6] R. Doc. No. 13 (A. at 292), revised with R. Doc. No. 10 (A. at 254).

[7] 38 Fed. Reg. 1258 (1973) (A. at 14).

[8] R. Doc. No. 9 (A. at 158).

medical and scientific data (hereafter referred to as the "Third Health Document").[9]

Court of Appeals Review

On the day the final regulations were published in the Federal Register,[10] December 6, 1973, the Petitioner herein promptly filed a petition to review the regulations with the Court of Appeals for the District of Columbia Circuit.[11] Similar petitions were also filed by PPG Industries, Inc., E. I. DuPont de Nemours & Co., Nalco Chemical Co. and the National Petroleum Refiners Association.

The panel assigned to the case heard arguments on September 9, 1974, and on December 20, 1974, the panel, one judge dissenting, ordered the regulations set aside. Extensive opinions (73 pages for the majority; 96 pages for the dissent) were issued January 28, 1975.

On March 17, 1975, the Court of Appeals granted the Respondent's petition for a rehearing *en banc*, and the panel judgment and opinions were vacated. Reargument was held May 30, 1975 before eight judges of the Court of Appeals, Chief Judge Bazelon not being present. On March 19, 1976, the Court decided by a vote of five to four to affirm the regulations, issuing the five separate opinions contained in the Joint Appendix.

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[9] R. Doc. No. 7 (A. at 27).

[10] 38 Fed. Reg. 33734 (Dec. 6, 1973) (A. at 1).

[11] Section 307(b)(1) of the Clean Air Act specifies the D. C. Circuit as the exclusive forum for review of regulations issued under Section 211. 42 U.S.C. § 1857h-5(b)(1).

REASONS FOR GRANTING THE WRIT

This case as no other before it calls into question the basic accountability of a federal administrative agency for its rule-making decisions in an area of environmental control that results in major economic and social impacts. As indicated by the vigorous opinions of the majority and the dissent below, the medical and scientific considerations involved in this case are complex and highly controversial.[12] The final outcome of this case will vitally affect the future of the entire lead additive industry, its employees and its stockholders. It will also have a direct and substantial effect on the refining industry and through it on our national energy policy.

The case requires an assessment of the propriety of the agency's regulatory action at three distinct, but related, levels: *First*, the statutory standard prescribed by Congress as a precondition for regulatory action; *second*, the methodology employed by the agency in assessing the available evidence; and *third*, the reasonableness of the procedures followed by the agency in its formulation and issuance of the regulations. At each of these levels the majority below accorded the agency the broadest possible discretion, thus effectively abdicating the court's role as an independent overseer of agency action. The majority was clearly motivated by some feeling that environmental regulations are entitled to special deference—indeed to virtual exemption from the normal rules designed to uncover and reverse arbitrary agency action. The majority has presented a "blank check" to the EPA for the future exercise of standardless, irreversible discretion affecting all areas of our national life. The

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[12] Former EPA Administrator, William D. Ruckelshaus, publicly described the subject as "one of the most controversial complicated problems that I have ever had to deal with." R. Doc. No. 1094, Transcript of press briefing, p. 28 (A. at 2585).

implications of this decision are so enormous as to require this Court's immediate attention.

A. The Majority Below Has Accorded the Respondent A Broad Policy Making Authority that Far Exceeds the Specific Power Congress Has Delegated to Respondent under Section 211 of the Clean Air Act.

The Respondent's authority to regulate the content of motor fuel derives solely from Section 211 of the Clean Air Act. That section, as a precondition to regulatory action against a fuel or fuel additive on health grounds, requires the Administrator to consider "all relevant medical and scientific evidence available to him."[13] Then, in unique language found nowhere else in the Clean Air Act, Section 211 provides that the Administrator may control or prohibit a fuel additive if the emission products of the additive "*will endanger*" the public health or welfare.

The meaning of "will endanger" is central to the question of Respondent's authority to issue the regulations. The Petitioner's position is that the "will endanger" standard, particularly when contrasted to the discretionary language of the other operative sections of the Act,[14] requires a threshold

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[13] Clean Air Act § 211(c)(2)(A), 42 U.S.C. § 1857f-6c(c)(2)(A). That section also requires the Administrator to consider "other technological or economically feasible means of achieving emission standards under Section 202."

[14] Section 108 authorizes the Administrator to issue air quality criteria for air pollutants that—"in his judgment"—adversely affect public health. 42 U.S.C. § 1857c-3. Section 109, in turn, requires the Administrator to prescribe national standards for such pollutants, allowing "an adequate margin of safety" for the protection of health. 42 U.S.C. § 1857c-4. Section 112 authorizes the promulgation of emission standards for air pollutants that—"in the judgment of the Administrator"—"may cause, or contribute to"—death or irreversible illness. 42 U.S.C. § 1857c-7. Section 202 authorizes the Administrator to prescribe new motor vehicle emission standards for any emissions which—"in his judgment"—are "likely to cause or to contribute to" air pollution endangering the public health. 42 U.S.C. § 1857f-1(a)(1).

determination by the Administrator on the basis of factual data that the emission products are, to a high degree of probability, in fact harmful to health.[15] A conclusion that harm is merely possible, or even likely,[16] is not sufficient.

Neither Respondent nor the majority below suggest that Respondent has satisfied such a standard; they rather contend that far less is required. The majority thus reads Section 211 as conferring broad authority to assess the relative risks of underprotection against overprotection, and to make a policy choice based on a "fear of uncertain or unknown harm." Maj. op. at 56.[17] According to the majority, the Respondent has been given a "mandate to protect the public health," and through "speculation, conflicts in evidence, and theoretical extrapolation," the agency may base the regulations on a "slight or nonexistent data base." *Id.* at 47. It is noteworthy that Congress could easily have written such a "mandate" into the statute, but instead it chose to condition its delegation of a power upon a threshold factual determination by the agency that could be reviewed by the courts in the traditional way. As Judge Wilkey aptly observed in his dissent:

> "In essence, it is argued that the 'will endanger the public health . . .' standard is a delegation of quasi-legislative power to the Administrator and not a re-

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[15] "Endanger" means "to bring into danger or peril of *probable* harm or loss." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 748 (1971) (emphasis added).

[16] The distinction between "probable" and "likely" is clearly explained by Webster: "Something probable has so much evidence in its support or seems so reasonable that it commends itself to the mind as worthy of belief . . . . [I]n contrast with *probable*, *likely* does not as often or as definitely suggest grounds sufficient to warrant a presumption of truth . . . ." WEBSTER'S NEW DICTIONARY OF SYNONYMS 639 (1968) (emphasis in original).

[17] References to the majority opinion are to the opinion authored by Judge Wright contained in the Joint Appendix.

> quirement that he reach a reasoned determination purely on the scientific and medical data." Dissenting op. at 55.[18]

In the judgment of the dissenters, such a construction by the majority "is to grant the plainest license for the wildest speculation."[19] Dissenting op. at 53. It is also contrary to the plain language used by the Congress in Section 211.

The Respondent has argued from the outset that, because its role in protecting the environment is so important, the agency should be released from the narrow confines of Section 211 and given more discretion to regulate automotive fuels (with fewer standards to meet). Amazingly, this request was not made to Congress, the sole constitutional source of all Respondent's authority, but to the Court of Appeals. And the majority affirmatively responded with a new judicial grant of authority, embodied in this broad assertion:

> "Regulators such as the Administrator must be accorded flexibility, a flexibility that recognizes the special judicial interest in favor of protection of the health and welfare of people, even in areas where certainty does not exist." Maj. op. at 46.

Then, as if to set a universal standard for all environmental rule-making, the majority concluded:

> "Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting be-

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[18] References to the dissenting opinion are to the opinion authored by Judge Wilkey contained in the Joint Appendix.

[19] Judge MacKinnon, in a separate dissenting opinion, agreed. "In my view the court's opinion in a number of respects exaggerates the Administrator's ability to act in the policy field without an underlying factual basis . . . . Thus I do not agree that Congress intended to vest the Administrator with authority to act on a speculative basis to the extent the court would allow." Opinion by MacKinnon, J., at 3.

> cause it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect." Maj. op. at 53-54.

The Petitioner submits that the specific and limited grant of statutory authority made by Congress, not a general expression by the courts of need for flexibility in areas affecting the public health, should govern the validity of an agency's rule-making in a given case. In certain areas, Congress has indeed conferred broad policy making discretion; in others, such as Section 211, it has not. In every case, however, the plain language employed by the Congress should control.[20] Certainly the courts should not extend their deference to administrative expertise to the point where the clear standards set by Congress may be ignored by the agency.

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[20] The significance of the particular language chosen for a statute is well illustrated by a comparison of Section 211 to the language and legislative history of the recently enacted Safe Drinking Water Act. That Act empowers the Administrator of EPA to prescribe standards for drinking water contaminants, which "in the judgment of the Administrator, may have any adverse effect on the health of persons . . . ." 42 U.S.C. § 300f(1)(B). In drafting the language of the Drinking Water Act, the House Interstate and Foreign Commerce Committee, the same House Committee that reported out the Clean Air Act Amendments of 1970, deliberately chose the word "may," rather than "will," which appears in Section 211, with purpose. As the Committee's report explains: "The words used by the Committee were carefully chosen. Because of the essentially preventive purpose of the legislation, the vast number of contaminants which may need to be regulated, and the limited amount of knowledge presently available on the health effects of various contaminants in drinking water, the Committee did not intend to require conclusive proof that any contaminant *will* cause adverse health effects as a condition for regulation of a suspect contaminant. Rather, all that is required is that the Administrator make a reasoned and plausible judgment that a contaminant *may* have such an effect." H. Rep. No. 93-1185, 93d Cong., 2d Sess., U.S. Code Cong. & Admin. News 6463 (1974) (emphasis in original).

Where Congress intends for an agency to exercise broad policy making discretion, to err on the side of overprotection in an area "on the frontiers of scientific knowledge,"[21] Congress carefully selects words particularly suited to that purpose—"may," "likely," "risk,"[22] "in his judgment." By contrast, where the subject matter has been thoroughly studied for more than fifty years, as with lead antiknocks,[23] Congress understandably requires firm factual determinations, for which "will endanger" is more appropriate.

The point is that, the majority below notwithstanding, no generality is possible as to the standard to be applied in environmental rule-making. Congress has prescribed varying degrees of accountability for agency rule-making, and the appropriate standard in a given case can only be determined on the basis of the particular statutory language employed.[24] In the case of regulation of fuel content, which the majority concedes Congress expected Respondent to undertake only with trepidation,[25] Congress obviously contemplated that the agency would be held to a high degree of accountability.

The Respondent has not concluded that the evidence supports a "will endanger" conclusion for lead antiknocks.

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[21] Maj. op. at 54.

[22] For example, the toxic substances legislation now pending in Congress would authorize the Administrator of EPA to ban the use of any chemical substance that he finds "presents or is likely to present an unreasonable risk of injury to health or the environment." S. 3149, 94th Cong., 2d Sess., § 6, at 36.

[23] The majority argues that although lead additives have been studied for 50 years, emissions at present levels have existed only for the last 15-20 years. Maj. op. at 49. The record evidence shows that in spite of increases in airborne lead levels in the past 20 years, blood levels have not increased. R. Doc. No. 817, Fig. 1-1.

[24] For this reason, the majority's reliance on other cases, involving totally different statutes and different facts, is misplaced.

[25] Maj. op. at 16 n. 14.

Indeed, Respondent has even conceded that the evidence does not establish a "reasonably clear causal relation" between ambient lead levels and adverse health effects, which according to Respondent precludes the setting of ambient air standards for lead under Section 108-109. EPA Supp. Brief at 15.[26] All the Respondent has suggested is that lead emissions from motor vehicles present a "significant risk of harm to the health of urban populations, particularly the health of city children . . . ," and this only when lead emissions from autos are combined with other sources of lead.[27]

Passing up the other, less rigorous options given to it under the Clean Air Act (ambient air standards, emission limitations), Respondent has taken the extreme action of regulating fuel content, at enormous costs to the petroleum industry and the motoring public, without any real knowledge that lead additives are a direct endangerment to public health, or that their reduction will have any measurable, beneficial effect.

Congress could take such action, perhaps; but Respondent cannot, at least not under Section 211. For purposes of this case and those that will inevitably follow, it is essential that this Court restrain administrative rule-making within its proper limits and restore the statutory standard laid down by Congress as the measure of regulatory power.[28]

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[26] The reference is to the supplemental brief filed by Respondent upon rehearing *en banc* in the Court of Appeals.

[27] 38 Fed. Reg. 33734 (Dec. 6, 1973) (A. at 1).

[28] As this Court has often reminded: "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *NLRB* v. *Brown,* 380 U.S. 278, 291 (1965).

B. The Majority Below Has So Narrowed The Scope of Judicial Review of Environmental Regulatory Actions As To Place Deference To Supposed Administrative Expertise Above The Standard of Reasoned Decision-Making.

Guided by the opinions of this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971),[29] and *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281 (1974),[30] the dissenting judges below carefully reviewed the record and concluded that Respondent had not taken the objective, hard look at the evidence that Section 211 and "reasoned decision-making" require,[31] and that the methodology employed by the agency in assessing the evidence had been arbitrary and capricious.[32]

The record in this case abounds with danger signals that Respondent had not been rational and principled in its approach to the subject. The waffling of positions during the three year rule-making through three separate health documents—alleging health *hazards* of lead in the first,[33]

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[29] The reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971).

[30] "[T]hough an agency's finding may be supported by substantial evidence . . . it may nonetheless reflect arbitrary and capricious action. * * * The agency must articulate a 'rational connection between the facts found and the choice made.' " *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284-85 (1974).

[31] "Its supervisory function calls on the court to intervene . . . if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a hard look at the salient problems, and has not genuinely engaged in reasoned decision-making." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[32] "The Administrator must sustain the burden of adducing a reasoned presentation supporting the reliability of EPA's methodology." *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973).

[33] R. Doc. No. 13, "Health Hazards of Lead," EPA (Feb. 23, 1971) (A. at 292).

the health *effects* of lead in the second,[34] and finally the health *implications* of lead in the third[35]—indicated a grasping at straws in the evidence. The dissent recognized Respondent's prolonged struggle with the evidence as significant, saying:

> "This extended gestation period has significance in itself. Implicit in the administrative record generated by this three-year delay is the recognition by EPA that available scientific data did not provide a clear and certain basis for reaching the statutorily mandated conclusion, *i.e.*, that a 'fuel additive will endanger the public health or welfare.'
>
> "* * * The history of the regulations is really the history of the EPA Health Documents, a history of EPA's effort to discover somewhere, somehow, a scientific rationale which would withstand the unanimous criticism of the remainder of the government scientific community." Dissenting op. at 6-7.

The dissent was also struck by the fact that every other agency of the Federal Government that had studied the evidence—the Department of Health, Education and Welfare, the Department of the Interior, the Department of Commerce, the White House Office of Science and Technology, the National Institute for Occupational Safety and Health of the United States Public Health Service—had unanimously concluded that Respondent's position on the health effects of lead antiknocks was without support in the evidence.[36]

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[34] R. Doc. No. 9, "EPA's Position on the Health Effects of Airborne Lead" (Nov. 29, 1972) (A. at 158).

[35] R. Doc. No. 7, "EPA's Position of the Health Implications of Airborne Lead" (Nov. 28, 1973) (A. at 27).

[36] See the review of the other agency criticisms at Dissenting op. pp. 8-15. "Our analysis of the flaws in the Administrator's logic finds powerful support in the unaminity of conclusion of the independent scientific minds throughout the Government outside of EPA itself." Dissenting op. at 15-16.

The record also contained numerous expressions of concern from the independent scientific community highly critical of Respondent's analysis and conclusions.[37] Within the agency itself, serious questions had been expressed as to the scientific soundness of any health basis for the regulations.[38]

The majority dismisses the contrary evidence and critical comment with the conclusion that "evidence may be isolated that supports virtually any inference one might care to draw." Maj. op. at 74. In the majority's view, "the problem here is one of choosing among the items of evidence," *id.* at 80, and as to the basis employed in such choosing, the majority would simply "defer to the Administrator's judgment." *Id.* at 81. In environmental rule-making, where the record evidence is conflicting and inconclusive, the majority has thus held that the reviewing court must be "highly deferential" toward the agency's decision, *id.* at 68, and affirm that decision if it reflects but minimal rationality. *Id.* at 73.[39] Indeed, as interpreted by two members of the majority (Judges Bazelon and McGowan), a reviewing court must affirm on the basis of procedural regularity alone,

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[37] Dr. Anna M. Baetjer, a member of the National Air Quality Criteria Advisory Committee, critically challenged Respondent's analysis in the health documents, saying: "I think this document lacks scientific, basic sound, scientific knowledge." (A. at 1052). Similarly, Dr. Norton Nelson, a consultant to EPA's Hazardous Materials Advisory Committee, observed: "[W]hat I read here is such a tenuous argument that it becomes, in some degree, self-destroying. And I find it completely deficient." (A. at 998).

[38] A. at 1057; A. at 960; A. at 1936.

[39] Under the minimal rationality standard, as previously explained by Judge Wright, an administrative regulation "can be less than reasonable and still survive the 'arbitrary and capricious' test"; all that is required is that the agency satisfy "only the most rudimentary command of rationality." Wright, *The Courts and the Rule-Making Process: The Limits of Judicial Review,* 59 Cornell L. Rev. 375, 392 (1974).

without regard to the substantive rationality of the agency's decision (opinion by Bazelon, C.J., at 1-4)—a position Judge Leventhal recognized as advocating "no substantive review at all." Opinion by Leventhal, J., at 1.,

The problem with the majority's suggested standard of review (whether it be Judge Wright's or Chief Judge Bazelon's) is that it virtually immunizes the regulatory agency from substantive accountability, a result totally at odds with the "clear error of judgment" test prescribed by this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), a decision Judge Wright finds "difficult to plumb." Maj. op. at 70 n. 74. Where the evidence is indeed conflicting, the agency would have no difficulty in reciting isolated bits and pieces of inferential support in the record for its position, and thereby establish the minimal rationality the majority says it must affirm. If the majority's analysis is correct, the exercise of judicial review is but a charade.

As the dissent perceived, the question of rationality in administrative rule-making cannot truly be determined by automatically deferring to the agency's judgment in selecting evidence from the record to support its position. Rather, the crucial question to be asked is *why* the agency selected the evidence it did and rejected others.[40] If, in answer to that question, the agency's basis for assessing the evidence is found to be inconsistent and variable according to whether

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[40] In the words of the dissent, "[T]he court concludes that '[t]he problem here is one of choosing among the items of evidence.' We respectfully disagree. The problem here is really one of choosing among the items of evidence *and explaining why!* The Administrator disagreed with the negative conclusions of the Seven Cities study and several other studies, but never said why he disagreed. This is why we *can* fault his conclusion." Dissenting op. at 72 (emphasis in original).

the particular study supports the agency's position or opposes it, the rule-making can only be characterized as arbitrary and irrational.[41]

With disturbing frequency, the record reveals the use of inconsistent criteria by Respondent in the assessment of evidence. Where a study fails to support a basic premise in Respondent's position, such as, for example, that increased levels of airborne lead correspond to increased blood lead levels,[42] Respondent has rejected the study because of its failure to control dietary sources of lead. In the case of studies supporting Respondent's position, however, the absence of dietary control is forgotten.[43] In response to one of Respondent's more blatant inconsistencies, the dissent remarked:

> "[I]t passes our understanding how anyone can find dietary control a problem in a comparison between greater Philadelphia and greater New York (thus justifying rejection of that data), but of no importance in a comparison between Scarsdale and Harlem (thus justifying reliance on urban-suburban data from greater New York). The art of reconciling total inconsistencies has soared to new heights when this court can seriously conclude (1) that 'dietary lead [can] be assumed relatively constant' between the most affluent

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[41] This Court has recognized that even where evidence exists to support an agency rule, the rule "may nonetheless reflect arbitrary and capricious action." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974).

[42] The Seven Cities Study (A. at 840), conducted under the joint sponsorship of EPA and industry, is generally recognized as the most extensive epidemiological study in the field. That study found no significant correlation between airborne lead levels and blood lead levels.

[43] As discovered by the dissent, "the record indicates that *even the studies relied upon by the Administrator failed in this same respect.*" Dissenting op. at 76 (emphasis in original).

> and the least affluent neighborhoods of greater New York City and (2) that '[t]he Administrator treated *all* the evidence in a consistent and rational manner.' The Administrator has thus utterly failed to present us with a reasoned and principled analysis of the evidence." Dissenting op. at 77-78 (footnotes omitted).

Further, where Respondent fails to provide *any* explanation for its rejection of contrary data, the majority has filled the gap with *post hoc* rationalizations as support for the agency's decision.[44] In so doing, the majority has overstepped its bounds as a *reviewing* court, and has merely accentuated the inadequacies in Respondent's analysis.[45]

In short, the record demonstrates that rather than engaging in the objective, hard look at the evidence that Section 211 contemplates, Respondent has searched high and low for bits and pieces of inferential support for the "get the lead out" crusade that was predetermined by Respondent even before the rule-making process began. In the process, Respondent has functioned as an advocate, not the impartial analyst of the evidence Congress clearly intended. Under the majority's "highly deferential" standard of review, such single minded advocacy on the part of regulatory agencies is wholly endorsed. That expert agencies are entitled to some deference is not disputed, but there must come a point at which the danger signals of arbitrariness are so clear that

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[44] Indeed it is highly significant that the majority, while protesting that a substantive review of the evidence is unnecessary or even improper, devotes 31 pages of its opinion to such a review, in which it undertakes to explain away the shoddy analysis and biased conclusions of the Respondent's "health documents."

[45] "[T]he specific decision must be explained, not merely explainable, in terms of the ingredients announced by the Administrator as comprising the Agency's policies and standards." *Environmental Defense Fund, Inc.* v. *EPA*, 465 F.2d 528, 539 (D.C. Cir. 1972).

not even "scientific expertise" can shield an agency from judicial intervention.[46]

The record here reveals a classic case of arbitrary rule-making. If such arbitrariness is to be excused in this case, then judicial review has been reduced to an exercise in form only, totally devoid of substance. And when judicial review is gone, there is no protection left against arbitrary procedures, manipulation of data or even political misuse of agency powers.

C. By Sanctioning Regulations Based Principally Upon Preliminary, Untested Data Never Subjected to Scrutiny by the Scientific Community Or Made Available To The Public For Meaningful Comment, The Majority Below Has Frustrated The Policy of The Administrative Procedure Act, And Further Reduced The Due Process Accountability of Administrative Agencies For Their Their Rule-Making Decisions.

Basic to all federal rule-making proceedings is the fundamental due process requirement that the public be advised of the basis of the proposed action and be afforded a meaningful opportunity to comment thereon prior to adoption of the rule. This requirement, expressed in Section 4 of the Administrative Procedure Act,[47] reflects a recognition by Congress of the "essential canons of fairness." *Powhatan Mining Co.* v. *Ickes,* 118 F.2d 105, 109 (6th Cir. 1941).

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[46] *Accord, South Terminal Corp.* v. *EPA,* 504 F.2d 646, 665 (1st Cir. 1974) ("A court would abdicate its function were it, when confronted with important and seemingly plausible objections going to the heart of a key technical determination, to presume that the agency could never behave irrationally"); *Stark* v. *Weinberger,* 497 F.2d 1092, 1099 n. 14 (7th Cir. 1974) (Judicial review requires "more than an uncritical rubber stamping of the administrative action").

[47] 5 U.S.C. § 553.

The double standard the decision below has established for environmental rule-making is nowhere more pronounced than in the majority's assessment of Respondent's compliance with the notice and opportunity for comment requirements. Public comments on the first two proposals of the regulations (issued in February 1972 and January 1973, respectively), pointed out the fundamental defects in Respondent's position and caused the agency to withdraw each proposal. Under the unreported and unrealistic court order of October, 1973, to reach a final decision in thirty days,[48] however, Respondent issued the regulations and the Third Health Document without the benefit of advance notice or public comment.

Both the preamble to the final regulations and the Third Health Document refer to numerous sources and studies that had never been cited in the previous discredited documents. The Third Health Document contains a total of 190 citations to reference sources. Of that number, a full *151* of them were not cited in the previous health documents. Fifty-two of the references cited bear a date subsequent to November 29, 1972, the date of the second health document, indicating that they were not even in the literature when that review of the evidence was issued.

The significance of the new citations is not so much their numbers, but rather the importance Respondent has assigned to them in defending its position on the final regulations. The dissenting judges have very carefully reviewed the record in this case and have found, almost without exception, that the principal studies relied upon by Respondent were developed after the close of the comment period on the Second Health Document and were cited for the

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[48] *Natural Resources Defense Council* v. *EPA*, D.C. Cir. No. 72-2233; see discussion page 6 *supra*.

first time in the preamble to the final regulations or the Third Health Document.[49] Critical to Respondent's conclusion that concentrations of lead in the ambient air correlate directly with lead levels in the blood, for example, were two pilot isotope studies,[50] and an unpublished study from Japan.[51] As explained in the preamble to the regulations,[52] data from these studies were "preliminary" only and had "not yet been completely analyzed"; nevertheless, Respondent weighed them against the mass of previous data to the contrary and concluded that an air/blood correlation does exist. As the dissent discovered, these studies did not become available even to Respondent until October and July, respectively, of 1973, and were never mentioned by Respondent as important to its consideration until the final regulations were issued in November, 1973.

Similarly, Respondent has cited a series of studies it calls "persuasive evidence"[53] in support of its hypothesis that children eat dust and dirt contaminated by airborne lead from auto exhausts. As the dissent found, these studies were developed at the last minute, with no opportunity for scrutiny by the general scientific community. A study from Newark, New Jersey, of the effect of lead absorption of proximity to high traffic density, for example, had not even been published at the time the regulations were issued. Dissenting op. at 24. The scientific community thus had no

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[49] See dissenting op. at 17-50, where the dissent first isolates the new studies heavily relied upon by Respondent, and then details their availability (or lack thereof) to petitioners and the public for comment.

[50] R. Doc. No. 113 (A. at 678, 704).

[51] R. Doc. No. 462 (A. at 1092).

[52] 38 Fed. Reg. 33735 (Dec. 6, 1973) (A. at 3).

[53] Third Health Doc. at VI-20 (A. at 130).

opportunity to determine whether the study had taken into account such important variables as condition of housing, age or ethnic group. Likewise, studies from Chicago, Philadelphia and Rochester which Respondent has termed as "persuasive" did not come to Respondent until *after* the court below had ordered the agency to make a decision within thirty days and shortly before the regulations were issued. Dissenting op. at 25. Again, no opportunity for public comment on these critical studies was afforded.

The majority below considers this objection to Respondent's procedure unimportant, stating that the agency had invited and received public comment on the lead phasedown proposal on three previous occasions. Maj. op. at 99. What the majority refuses to recognize, however, is that the basic documents upon which Respondent ultimately relied in defending its position were effectively shielded from public scrutiny by the timing of the court's order and issuance of the regulations. As the dissent noted:

> "[B]y October-November 1973 he [the Administrator] was largely shifting his ground from the discredited scientific data of the First and Second Health Documents to *new* data embraced in the Third Health Document. This is the crucial time at which informed comment from the best scientific minds in other government agencies and elsewhere should have been sought —unless EPA was irrevocably resolved to promulgate the restrictive regulations on lead which it had originally proposed years before, in spite of the barrage of unanimous critical comment from other government scientific minds, as well as interested outsiders." Dissenting op. 26-27.

Concerning the prior opportunities for comment, the dissent recognized:

> "It certainly, as a practical matter does no good for an agency to propose an action, support it with data which is severely criticized, abandon that data for new, fail to subject the new data to informed comment, and then promulgate the same proposed regulations on the basis of new data." Dissenting op. at 38.

The majority further suggests that the notice and opportunity for comment requirements of the Administrative Procedure Act were fully satisfied when all the studies and documents referred to in the preamble and the Third Health Document were placed in the agency's public information file, Maj. op. at 100 & n. 102, and that in any event Petitioner can have no complaint because it was furnished all the record documents as a result of a Freedom of Information Act suit. Maj. op. at 108 n. 118. The absurdity of this position is obvious. As observed by the dissent:

> "[I]t is not enough under the Administrative Procedure Act merely to make the scientific data 'available' to the public and all interested parties. *First,* the claimed 'availability' here boils down to a compelled furnishing of data to *one* interested party under the Freedom of Information Act and the placing of hundreds of miscellaneous documents—scientific studies, papers, published articles, etc.—in a poorly indexed dust bin of a file in the public rooms of the Environmental Protection Agency. *Second,* there was *never any notice*—and our colleagues do not and can not contend that there was—*on which data* out of the great miscellaney EPA *would rely* until the Third Health Document was published simultaneously with the regulations. *Third,* the opportunity to comment effectively on the new data on which EPA ultimately relied was farcical, as our detailed discussion above nails down." Dissenting op. at 46-47 (emphasis in original).

The procedural irregularities sanctioned below have serious implications for future regulatory actions. The majority opinion blithely ignores (and indeed discounts by its overly deferential approach) the growing public clamor for independent research bodies to advise the regulatory agencies on highly complex technical issues like this (as was done in the recent restructuring of the Atomic Energy Commission). The majority fails to take into account its own unrealistic time limitation placed on the Respondent that made it impossible for public comment to be solicited with respect to the final regulations.[54] Finally, the majority puts its stamp of approval on a procedure whereby an agency avoids the public notice and comment requirements Congress has imposed by simply dumping thousands of pages of record material into a public information file (without proper indices or classifications)—a procedure totally repugnant to traditional concepts of principled administrative rule-making.[55] As the dissent perceived, "From the pages of the court's opinion there seeps the theme that this is an environmental case; hence, the court like the agency need not labor by the usual rules." Dissenting op. at 50. In order to assure the public the "most intelligent, optimally beneficial decision" possible,[56] however, environmental agencies

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[54] It is perhaps of considerable importance that Judge Wright, who wrote two lengthy opinions in this case to justify all the Respondent's actions, was the leading member of the panel that put the Respondent under an unrealistic 30 day deadline to take final action against lead antiknocks.

[55] Judges Bazelon and McGowan, in their concurring opinion, likewise lamented the procedural inadequacies of Respondent's rulemaking, observing that "Ordinarily . . . I think a record which so burdens judicial review would require a remand for clarification." Op. by Bazelon, C.J., at 5. Indeed, a total of six judges of the court below found significant irregularities in Respondent's procedures.

[56] *Calvert Cliffs' Coord. Comm., Inc.* v. *AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

can be no less accountable for their decisions than are other administrative bodies.

The actions of the administrative agency in this case are so difficult to justify that the majority below first had to go to extremes to supply even "minimal rationality," and then had to be overly deferential to so-called administrative expertise to reach its final result. In so doing, the majority has notified the Respondent that henceforth there will be no meaningful judicial review of environmental regulations. This will likely encourage the disregard of statutory standards, the performance of shoddy scientific analysis and even the manipulation of data, and the avoidance of rules designed to give the public advance notice and a meaningful opportunity to comment on proposed regulations. Such a momentous redefinition of the scope of judicial review in the vitally important area of environmental controls requires prompt review by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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May 5, 1976

CERTIFICATE OF SERVICE

I, John J. Adams, counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Petition for Writ of Certiorari in the United States Mail, first class postage prepaid, this 5th day of May, 1976, addressed to: The Solicitor General, Department of Justice, Washington, D. C., and to Robert V. Zener, Environmental Protection Agency, Waterside Mall Building, 4th and M Streets, S.W., Washington, D. C. 20460.

JOHN J. ADAMS
Counsel for Petitioner

APPENDIX A

APPENDIX A

Clean Air Act
42 U.S.C. §§ 1857c-3, 1857c-4, 1857f-1, 1857f-6c

Administrative Procedure Act
5 U.S.C. § 553

Environmental Protection Agency Regulations
40 C.F.R. §§ 80.1, 80.2, 80.20, 80.25, 80.26

42 U.S.C. § 1857c-3

Air Quality Criteria And Control Techniques

Sec. 108. (a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the

ambient air in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b)(1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such com-

mittee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

42 U.S.C. § 1857c-4

National Ambient Air Quality Standards

Sec. 109. (a)(1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria

and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b)(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

42 U.S.C. § 1857f-1

Sec. 202. (a) Except as otherwise provided in subsection (b)—

(1) The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment causes or contributes to, or is likely to cause or to contribute to, air pollution which endangers the public health or welfare. Such standards shall be applicable to such vehicles and engines for their useful life (as determined under subsection (d)),

whether such vehicles and engines are designed as complete systems or incorporate devices to prevent or control such pollution.

(2) Any regulation prescribed under this subsection (and any revision thereof) shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period.

(b)(1)(A) The regulations under subsection (a) applicable to emissions of carbon monoxide and hydrocarbons from light duty vehicles and engines manufactured during or after model year 1977 shall contain standards which require a reduction of at least 90 per centum from emissions of carbon monoxide and hydrocarbons allowable under the standards under this section applicable to light duty vehicles and engines manufactured in model year 1970.

The regulations under subsection (a) applicable to emissions of carbon monoxide and hydrocarbons from light-duty vehicles and engines manufactured during model years 1975 and 1976 shall contain standards which are identical to the interim standards which were prescribed (as of December 1, 1973) under paragraph (5)(A) of this subsection for light-duty vehicles and engines manufactured during model year 1975.

(B) The regulations under subsection (a) applicable to emissions of oxides of nitrogen from light duty vehicles and engines manufactured during or after model year 1978 shall contain standards which require a reduction of at least 90 per centum from the average of emissions of oxides of nitrogen actually measured from light duty vehicles manufactured during model year 1971 which are not subject to

any Federal or State emission standard for oxides of nitrogen. Such average of emissions shall be determined by the Administrator on the basis of measurements made by him.

The regulations under subsection (a) applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model years 1975 and 1976 shall contain standards which are identical to the standards which were prescribed (as of December 1, 1973) under subsection (a) for light-duty, vehicles and engines manufactured during model year 1975. The regulations under subsection (a) applicable to emissions of oxides of nitrogen from light-duty vehicles and engines manufactured during model year 1977 shall contain standards which provide that such emissions from such vehicles and engines may not exceed 2.0 grams per vehicle mile.

(2) Emission standards under paragraph (1), and measurement techniques on which such standards are based (if not promulgated prior to the date of enactment of the Clean Air Amendments of 1970), shall be prescribed by regulation within 180 days after such date.

(3) For purposes of this part

(A)(i) The term 'model year' with reference to any specific calendar year means the manufacturer's annual production period (as determined by the Administrator), which includes January 1 of such calendar year. If the manufacturer has no annual production period, the term 'model year' shall mean the calendar year.

(ii) For the purpose of assuring that vehicles and engines manufactured before the beginning of a model year were not manufactured for purposes of circumventing the effective date of a standard required to be prescribed by subsection (b), the Administrator may prescribe regulations

defining 'model year' otherwise than as provided in clause (i).

(B) The term 'light duty vehicles and engines' means new light duty motor vehicles and new light duty motor vehicle engines, as determined under regulations of the Administrator.

(4) On July 1 of 1971, and of each year thereafter, the Administrator shall report to the Congress with respect to the development of systems necessary to implement the emission standards established pursuant to this section. Such reports shall include information regarding the continuing effects of such air pollutants subject to standards under this section on the public health and welfare, the extent and progress of efforts being made to develop the necessary systems, the costs associated with development and application of such systems, and following such hearings as he may deem advisable, any recommendations for additional congressional action necessary to achieve the purposes of this Act. In gathering information for the purposes of this paragraph and in connection with any hearing, the provisions of section 307 (a) (relating to subpoenas) shall apply.

(5)(A) At any time after January 1, 1975, any manufacturer may file with the administrator an application requesting the suspension for one year only of the effective date of any emission standard required by paragraph (1)(A) with respect to such manufacturer for light-duty vehicles and engines manufactured in model year 1977. The Administrator shall make his determination with respect to any such application within sixty days. If he determines, in accordance with the provisions of this subsection, that such suspension should be granted, he shall simultaneously with such determination prescribe by regulation

interim emission standards which shall apply (in lieu of the standards required to be prescribed by paragraph (1)(A) of this subsection) to emissions of carbon monoxide or hydrocarbons (or both) from such vehicles and engines manufactured during model year 1977.

(B) Any interim standards prescribed under this paragraph shall reflect the greatest degree of emission control which is achievable by application of technology which the Administrator determines is available, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers.

(C) Within 60 days after receipt of the application for any such suspension, and after public hearing, the Administrator shall issue a decision granting or refusing such suspension. The Administrator shall grant such suspension only if he determine that (i) such suspension is essential to the public interest or the public health and welfare of the United States, (ii) all good faith efforts have been made to meet the standards established by this subsection, (iii) the applicant has established that effective control technology, processes, operating methods, or other alternatives are not available or have not been available for a sufficient period of time to achieve compliance prior to the effective date of such standards, and (iv) the study and investigation of the National Academy of Sciences conducted pursuant to subsection (c) and other information available to him has not indicated that technology, processes, or other alternatives are available to meet such standards.

(D) Nothing in this paragraph shall extend the effective date of any emission standard required to be prescribed under this subsection for more than one year.

(c)(1) The Administrator shall undertake to enter into appropriate arrangements with the National Academy of Sciences to conduct a comprehensive study and investigation of the technology feasibility of meeting the emissions standards required to be prescribed by the Administrator by subsection (b) of this section.

(2) Of the funds authorized to be appropriated to the Administrator by this Act, such amounts as are required shall be available to carry out the study and investigation authorized by paragraph (1) of this subsection.

(3) In entering into any arrangement with the National Academy of Sciences for conducting the study and investigation authorized by paragraph (1) of this subsection, the Administrator shall request the National Academy of Sciences to submit semiannual reports on the progress of its study and investigation to the Administrator and the Congress, beginning not later than July 1, 1971, and continuing until such study and investigation is completed.

(4) The Administrator shall furnish to such Academy at its request any information which the Academy deems necessary for the purpose of conducting the investigation and study authorized by paragraph (1) of this subsection. For the purpose of furnishing such information, the Administrator may use any authority he has under this Act (A) to obtain information from any person, and (B) to require such person to conduct such tests, keep such records, and make such reports respecting research or other activities conducted by such person as may be reasonably necessary to carry out this subsection.

(d) The Administrator shall prescribe regulations under which the useful life of vehicles and engines shall be determined for purposes of subsection (a)(1) of this section and

section 207. Such regulations shall provide that useful life shall—

(1) in the case of light duty vehicles and light duty vehicle engines, be a period of use of five years or of fifty thousand miles (or the equivalent), whichever first occurs; and

(2) in the case of any other motor vehicle or motor vehicle engine, be a period of use set forth in paragraph (1) unless the Administrator determines that a period of use of greater duration or mileage is appropriate.

(c) In the event a new power source or propulsion system for new motor vehicles or new motor vehicle engines is submitted for certification pursuant to section 206(a), the Administrator may postpone certification until he has prescribed standards for any air pollutants emitted by such vehicle or engine which cause or contribute to, or are likely to cause or contribute to, air pollution which endangers the public health or welfare but for which standards have not been prescribed under subsection (a).

42 U.S.C. § 1857f-6c

Regulations Of Fuels

Sec. 211. (a) The Administrator may by regulation designate any fuel or fuel additive and, after such date or dates as may be prescribed by him, no manufacturer or processor of any such fuel or additive may sell, offer for sale, or introduce into commerce such fuel or additive unless the Administrator has registered such fuel or additive in accordance with subsection (b) of this section.

(b)(1) For the purpose of registration of fuels and fuel additives, the Administrator shall require—

"(A) the manufacturer of any fuel to notify him as to the commercial identifying name and manufacturer of any additive contained in such fuel; the range of concentration of any additive in the fuel; and the purpose-in-use of any such additive; and

(B) the manufacturer of any additive to notify him as to the chemical composition of such additive.

(2) For the purpose of registration of fuels and fuel additives, the Administrator may also require the manufacturer of any fuel or fuel additive—

(A) to conduct tests to determine potential public health effects of such fuel or additive (including, but not limited to, carcinogenic, teratogenic, or mutagenic effects), and

(B) to furnish the description of any analytical technique that can be used to detect and measure any additive in such fuel, the recommended range of concentration of such additive, and the recommended purpose-in-use of such additive, and such other information as is reasonable and necessary to determine the emissions resulting from the use of the fuel or additive contained in such fuel, the effect of such fuel or additive on the emission control performance of any vehicle or vehicle engine, or the extent to which such emissions affect the public health or welfare.

Tests under subparagraph (A) shall be conducted in conformity with test procedures and protocols established by the Administrator. The result of such tests shall not be considered confidential.

(3) Upon compliance with the provisions of this subsection, including assurances that the Administrator will receive changes in the information required, the Administrator shall register such fuel or fuel additive.

(c)(1) The Administrator may, from time to time on the basis of information obtained under subsection (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products or such fuel or fuel additive will endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 202.

(B) No fuel or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (B) of paragraph (1) except after consideration of available scientific and economic data, including a cost benefit analysis comparing emission control devices or systems which are or will be in general use and require the proposed control or prohibition with emission control devices or systems which are or will be in general use and do not require the proposed control or prohibition. On request of a manufacturer of motor vehicles, motor vehicle engines, fuels, or fuel additives submitted within 10 days of notice of proposed rulemaking, the Administrator shall hold a public hearing and publish his findings with respect to any matter he is re-

quired to consider under this subparagraph. Such findings shall be published at the time of promulgation of final regulations.

(C) No fuel or fuel additive may be prohibited by the Administrator under paragraph (1) unless he finds, and publishes such finding, that in his judgment such prohibition will not cause the use of any other fuel or fuel additive which will produce emissions which will endanger the public health or welfare to the same or greater degree than the use of the fuel or fuel additive proposed to be prohibited.

(3)(A) For the purpose of obtaining evidence and data to carry out paragraph (2), the Administrator may require the manufacturer of any motor vehicle engine to furnish any information which has been developed concerning the emissions from motor vehicles resulting from the use of any fuel additive, or the effect of such use on the performance of any emission control device or system.

(B) In obtaining information under subparagraph (A), section 307(a) (relating to subpoenas) shall be applicable.

(4)(A) Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting use of a fuel or fuel additive in a motor vehicle or motor vehicle engine—

(i) if the Administrator has found that no control or prohibition under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to

the prohibition or control prescribed by the Administrator.

(B) Any State for which application of section 209(a) has at anytime been waived under section 209(b) may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

(C) A State may prescribe and enforce, for the purposes of motor vehicle emission control, a control or prohibition respecting the use of a fuel or fuel additive in a motor vehicle or motor vehicle engine if an applicable implementation plan for such State under section 110 so provides. The Administrator may approve such provision in an implementation plan, or promulgate an implementation plan containing such a provision, only if he finds that the State control or prohibition is necessary to achieve the national primary or secondary ambient air quality standard which the plan implements.

(d) Any person who violates subsection (a) or the regulations prescribed under subsection (c) or who fails to furnish any information required by the Administrator under subsection (b) shall forfeit and pay to the United States a civil penalty of $10,000 for each and every day of the continuance of such violation, which shall accrue to the United States and be recovered in a civil suit in the name of the United States, brought in the district where such person has his principal office or in any district in which he does business. The Administrator may, upon application therefor, remit or mitigate any forfeiture provided for in this subsection and he shall have authority to determine the facts upon all such applications.

5 U.S.C. § 553

§ 553. *Rule making.*

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, Sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

40 C.F.R. §§ 80.1, 80.2, 80.20, 80.25, 80.26

Part 80 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

1. In § 80.1, the second sentence is revised to read as follows:

§ 80.1 *Scope.*

* * * These regulations are based upon a determination by the Administrator that the emission product of a fuel or additive will endanger the public health, or will im-

pair to a significant degree the performance of a motor vehicle emission control device in general use or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulations promulgated; and certain other findings specified by the Act.

2. In § 80.2, a new paragraph (m) is added as follows:

§ 80.2 *Definitions.*

* * *

(m) "Lead additive manufacturer" means any person who produces a lead additive or sells a lead additive under his own name.

3. A new § 80.20 is added as follows:

§ 80.20 *Controls applicable to gasoline refiners.*

(a)(1) In the manufacture of gasoline at any refinery, no gasoline refiner shall exceed the average lead content per gallon specified below for each 3-month period (January through March, April through June, July through September, October through December):

(i) 1.7 grams of lead per gallon, after January 1, 1975;

(ii) 1.4 grams of lead per gallon, after January 1, 1976;

(iii) 1.0 grams of lead per gallon, after January 1, 1977;

(iv) 0.8 grams of lead per gallon, after January 1, 1978;

(v) 0.5 grams of lead per gallon, after January 1, 1979.

(2) For each 3-month period (January through March, April through June, July through September, October through December) the average lead content per gallon

shall be computed by dividing total grams of lead used at a refinery in the manufacture of gasoline by total gallons of gasoline manufactured at such refinery.

(3) For each 3-month period (January through March, April through June, July through September, October through December) commencing with the period January 1, 1975 through March 31, 1975, each refiner shall submit to the Administrator a report showing for each refinery (i) the total grams of lead in lead additive inventory on the first day of the period, (ii) the total grams of lead received during the period, (iii) the total grams of lead in lead additive inventory on the last day of the period, (iv) the total gallons of gasoline produced by such refinery during the period, and (v) the average lead content in each gallon of gasoline produced during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

(b) The provisions of paragraph (a)(1)(i) and (ii) of this section shall not be applicable to any refiner which does not have more than 30,000 barrels per day crude oil or bona fide feed stock capacity from owned or leased facilities or from facilities made available to such refiner under an arrangement such as, but not limited to, an exchange agreement (except one on a refined product for refined product basis) or a through-put or other form of processing agreement, with the same effects as though such facilities had been leased.

4. A new § 80.25 is added as follows:

§ 80.25 *Controls applicable to lead additive manufacturers.*

For each 3-month period (January through March, April through June, July through September, October through

December) commencing with the period January 1, 1975 through March 31, 1975, each lead additive manufacturer shall submit to the Administrator a report showing the total grams of lead shipped to each refinery by such lead additive manufacturer during the period. Reports shall be submitted within 15 days after the close of the reporting period, on forms supplied by the Administrator upon request.

5. A new § 80.26 is added as follows:

§ 80.26 *Confidentiality of information.*

Information obtained by the Administrator or his representatives pursuant to this part shall be treated, insofar as its confidentiality is concerned, in accordance with the provisions of 40 CFR Part 2.